CHUNG KHIAW BANK LTD.

v.

THE GOVERNMENT OF THE STATE OF SABAH & 3 ORS.

SUPREME COURT, KOTA KINABALU
DATO' PEH SWEE CHIN SCJ,
DATO' MOHAMED DZAIDDIN BIN HJ ABDULLAH SCJ,
DATUK CHARLES HO NYAN CHEUNG J.
[CIVIL APPEAL NO. 01-51 OF 1993]
14 APRIL 1994

LAND ACQUISITION: Acquisition - Apportionment of compensation - Land under charge - Quantum of compensation insufficient to cover loan taken under charge - Whether chargee entitled to whole compensation thereof - Whether compensation should be apportioned between chargor and chargee - Sabah Land Acquisition Ordinance (Cap. 69) s. 14.

The 4th respondent in this case owned 161 acres of land in Lahad Datu, Sabah. In 1968 the 4th respondent charged the said land to the appellant as security for a loan of RM 1.4 million. The loan outstanding under the said charge ballooned up with time and in March 1991 the amount due and owing to the appellant stood at RM 5,401,348.57. In that same month the State Government of Sabah acquired 4.1 acres of the charged land and on 9 September 1993 the High Court, Tawau, pursuant to s. 14 of the Sabah Land Acquisition Ordinance (Cap. 69), awarded compensation for the acquired portion in the sum of RM 704,915.40. The appellant claimed the whole of the said compensation and argued before the learned Judge, *inter alia*, that they were entitled to the whole compensation as the awarded sum was much less than the amount due and owing under the charge. The trial Judge rejected the argument and instead took the view that both the appellant and the 4th respondent were entitled to the compensation sum. Subsequently, guided by the formula which the Government valuer adopted, the learned Judge made an apportionment order and awarded RM 137,669.50 to the appellant and RM 567,245.90 to the 4th respondent respectively. The appellant appealed.

The issue was whether the learned trial Judge erred in principle in making the order he did and in not awarding the whole of the compensation sum to the appellant.

Held:

[1] As the Sabah Land Acquisition Ordinance (Cap. 69) does not provide any rules to determine the method of apportionment between the various persons interested, the broad general principle to follow is that every person interested, for which notice of acquisition under the Ordinance has been given, should be compensated for the loss he suffers as a result of the acquisition and that the apportionment should be proportionate to the value of interest which each party has in the property acquired. This general principle of apportionment, however, is not applicable to cases involving only a chargor and chargee where the right and interest of the chargee would be the primary consideration.

[2] The learned Judge erred in principle when he applied the general principle of apportionment to a special situation of this case. The Goverment valuer's formula, which is of general application, cannot apply to a charged property since a charge is indivisible and the relevant security is attached to the whole property. It follows that until the property is discharged, the interest of the appellant is on the whole property and any proceeds of the sale of the property will attach to the property. In any event it would be inequitable to make any apportionment in the instant case as the compensation sum awarded was very much less than the outstanding loan due to the appellant.

[3] The principle as laid down in *Topan Das v Jesaram* 17 PR. 1907 that when a portion of the mortgaged property is acquired and the compensation money awarded is less than the amount due under the mortgage, the mortgagee will be entitled to the whole of the compensation awarded is a sound principle and although it was laid down by the Indian Court while dealing with its own Transfer of Property Act, which has no equivalent in Sabah, it appears to be applicable to the present case.

[Appeal allowed. Order of apportionment set aside and the whole compensation money to be paid to the appellant].

[Bahasa Malaysia Translation of Headnote]

PENGAMBILAN TANAH: Pengambilan - Pengumpukan pampasan - Tanah di bawah gadaian - Kuantum pampasan tidak cukup untuk membayar hutang yang diambil di bawah gadaian - Sama ada pemegang gadaian berhak kepada keseluruhan pampasan

tersebut - Sama ada pampasan harus diumpukkan di antara penggadai dan pemegang gadaian - Ordinan Pengambilan Tanah Sabah (Bab 69) s. 14.

Responden keempat dalam kes ini memiliki 161 ekar tanah di Lahad Datu, Sabah. Dalam tahun 1968 responden keempat telah menggadaikan tanah tersebut kepada perayu sebagai jaminan untuk pinjaman berjumlah RM1.4 juta. Pinjaman yang tertunggak di bawah gadaian tersebut telah meningkat mengikut edaran masa dan dalam bulan Mac 1991 jumlah wang yang terhutang dan patut dijelaskan kepada perayu ialah sebanyak RM5,401,348.57. Dalam bulan yang sama Kerajaan Negeri Sabah telah mengambil 4.1 ekar tanah yang digadaikan dan pada 9 September 1993 Mahkamah Tinggi Tawau menurut s. 14 Ordinan Pengambilan Tanah Sabah (Bab 69), telah mengawardkan pampasan bagi bahagian tanah yang diambil itu dengan wang berjumlah RM704,915.40. Perayu menuntut keseluruhan pampasan tersebut dan telah menghujahkan di hadapan Hakim, antara lain, bahawa ia berhak kepada keseluruhan pampasan kerana jumlah wang yang diawardkan itu adalah kurang daripada jumlah wang yang terhutang dan patut dijelaskan di bawah gadaian tersebut. Hakim perbicaraan telah menolak penghujahan tersebut dan sebaliknya berpendapat bahawa kedua-dua perayu dan responden keempat adalah berhak kepada jumlah wang pampasan tersebut. Kemudiannya, dengan berlandaskan rumusan yang diterimapakai oleh penilai Kerajaan, Hakim berkenaan membuat suatu perintah pengumpukan dan mengawardkan RM137,669.50 kepada perayu dan RM567,245.90 kepada responden keempat. Perayu telah membuat rayuan.

Isunya ialah samaada Hakim berkenaan telah tersilap dari segi prinsip dalam membuat perintah tersebut dan untuk tidak mengawardkan keseluruhan jumlah wang pampasan kepada perayu.

Diputuskan:

[1] Oleh kerana Ordinan Pengambilan Tanah Sabah (Bab 69) tidak memperuntukkan sebarang kaedah untuk menentukan cara pengumpukan di antara beberapa orang yang berkepentingan, prinsip umum yang lebih luas untuk diikuti ialah setiap orang yang berkepentingan, di mana notis pengambilan telah diberikan, haruslah diberi pampasan untuk kehilangan yang ditanggung olehnya akibat pengambilan tersebut dan bahawa pengumpukan berkenaan haruslah berkadar dengan nilai kepentingan yang dimiliki oleh setiap pihak dalam harta yang diambil itu. Walau bagaimanapun, prinsip pengumpukan umum ini tidak terpakai ke atas kes-kes yang hanya melibatkan seorang penggadai dan pemegang gadaian di mana hak dan kepentingan pemegang gadaian merupakan pertimbangan utama.

[2] Hakim berkenaan telah tersilap dari segi prinsip apabila beliau menggunakan prinsip pengumpukan umum kepada suatu keadaan khas dalam kes ini. Rumusan penilai Kerajaan, yang terpakai secara umum, tidak boleh digunakan ke atas harta yang digadaikan memandangkan sesuatu gadaian itu tidak boleh dibahagi dan keseluruhan harta tersebut mempunyai jaminan. Oleh itu sehingga harta tersebut dilepaskan gadaiannya, kepentingan perayu adalah terletak ke atas keseluruhan harta tersebut dan sebarang hasil jualan daripada harta tersebut akan menjadi milik harta berkenaan. Walau apa pun jua, adalah tidak adil untuk membuat sebarang pengumpukan dalam kes ini memandangkan jumlah wang pampasan yang diawardkan adalah lebih rendah daripada hutang yang tertunggak kepada perayu.

[3] Prinsip yang digunakan dalam kes *Topan Das v. Jesaram* 17 PR. 1907 bahawa apabila sesuatu bahagian harta yang digadai-janji diambil dan wang pampasan yang diawardkan adalah lebih rendah daripada jumlah wang yang tetunggak di bawah gadai-janji tersebut, maka pemegang gadai-janji berhak kepada keseluruhan pampasan yang diawardkan, adalah merupakan suatu prinsip yang kukuh dan walaupun ianya diputuskan oleh Mahkamah India semasa berurusan dengan Akta Pindahmilik Hartanya, yang mana tidak bersamaan dengan di Sabah, nampaknya ia boleh digunakan dalam kes ini.

[Rayuan dibenarkan. Perintah pengumpukan diketepikan dan keseluruhan wang pampasan hendaklah dibayar kepada perayu].

Cases referred to:

Topan Das v. Jesaram 17 PR 1907 ***(foll)***

Pratap Chand v. Nathu Ram 103 PLR 1909 ***(not foll)***

P. Valia Raja v. T.S. Veeraraghava Iyer, AIR [1961] Kerala 222 (FB) ***(foll)***

Legislation referred to:
Civil Law Act 1956, s. 3(1)(b)
Sabah Land Acquisition Ordinance, s. 14
Land Acquisition Act 1894 (India)
Transfer of Property Act, s. 73(2) (India)

Other sources referred to:
Compulsory Acquisition of Land in India, Aggarwala, 1992 Edn., p. 757
Law of Land Acquisition and Compensation (1979), V.G. Ramachandran, pp. 296-297, 6th Edn.

For the appellant - Alex Khoo (Wong Kum Heng with him); M/s. Peter Lo & Co.
For the 1st, 2nd and 3rd respondents - Mohd. Salleh Lamsin
For the 4th respondent - Mohd. Anuar Datuk Ghani; M/s. Anuar Datuk Ghani & Associates

JUDGMENT

Mohamed Dzaiddin bin Hj. Abdullah SCJ: This is an appeal from the decision of the High Court Tawau given on 9 September 1993 on the question of an apportionment of compensation made by the trial Judge sitting with two assessors under s. 14 of the Sabah Land Acquisition Ordinance (Cap. 69), which states:

> (1) All questions and claims relating to the payment of compensation under this Ordinance and to the apportionment of such compensation shall, save as is hereinafter provided, be submitted to a Judge.
> (2) The Judge shall have full power to assess, award and apportion compensation in such cases, in accordance with the provisions of this Ordinance:

The following account of the facts of the case is taken from the grounds of decision of the learned trial Judge.. The 4th respondent is the registered owner of seven pieces of property bearing title Nos. CL. 115312591, CL. 115312608, CL. 115313310, CL. 115107974, CL. 115312644, CL. 115313276 and CL. 115313294 in Lahad Datu (the said property), comprising an approximate area of 161.214 acres. By a memorandum of charge executed on 9 August 1968 under Memorial No. 92666, he charged the said property to the appellant as security for a loan of RM1.4 million. As at 31 March 1991, the amount due and owing by him to the appellant was RM5,401,348.57. Some time in March 1991, the Government of Sabah compulsorily acquired 4.141 acres of the said property for highway construction. On 9 September 1993, the High Court made an award of RM704,915.40 as compensation for the acquired portion and apportioned the said amount by awarding RM567,245.90 to the 4th respondent and RM137,669.50 to the appellant. It is to be noted that the amount to be paid to the appellant was very much less than the outstanding debt due to them under the charge.

The Court made the apportionment on a method formulated by the Government valuer, which was based according to the value of the quantum of interest a party loses by reason of the acquisition. The value of the quantum of interest which the appellant lost was assessed as follows:

Loan out-standing as at 31 March 1991 (A) = Rate of loan.

Total area of charged titles (B)

$5,401,384.57 = $33,504.22 per acre.

161.214 acres

say = $33,500.00 per acre.

Therefore, the appellant's share of the compensation of RM137,669.50 was arrived at by multiplying RM33,500.00 by 4.141 acres (the area acquired).

The learned Judge preferred the above method of apportionment and rejected entirely the appellant's claim that there should not be any apportionment, but instead the whole amount be paid to them. In his grounds of judgment, His Lordship stated (pp. 44-46 AR):

> The most preferred method should be an apportionment according to the value of the quantum of interest which a party loses by reason of the acquisition. See Sanjiva Row on **Law of Land Acquisition and Compensation,** 7th Edn. at p. 74, an authority cited by Counsel for the chargee. ... Counsel for the chargee relied on, to support his contention that the whole amount should be paid to the chargee, the following passage of the said author at p. 78, viz:
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> > When a portion of the mortgaged property is acquired and the compensation money awarded is less than the amount due under the mortgage, the mortgagee is entitled to the entire compensation money payable to the mortgagor.
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> But that passage was a comment on a s. 73(2) of the Indian Transfer of Property Act which reads:
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> > Where the mortgaged property or any part thereof or any interest therein is

required under the Land Acquisition Act 1894, or any other enactment for the time being in force governing the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of mortgage money, in whole or in part out of the amount due to the mortgagor as compensation.

There is no similar statutory provision in Sabah. Another reason for rejecting the proposition is this. When a loan is required from a financial institution, the financial institution, almost invariably, requires a valuation report of the property concerned which is to serve as security for the loan. One of the factors which the bank takes into account is the value of the property. A bank, except in cases where Bank Negara requires, seldom, if ever, lends money equals to the value of the property offered by the borrower as security. There is, therefore, no reason why the bank should get the full amount of the compensation representing the full market value of the property when the bank was not prepared to grant a loan equivalent to the full market value of the property. The method adopted by the Government is more equitable. If there is evidence that the chargee had given the loan equivalent to the full market value of the properties at the time of the loan, then it would be equitable to apportion the moneys in a manner that the loan of the chargee is satisfied before the Landowner can get any of the moneys. But there is no evidence that the chargee had given the loan equivalent to the full market value of the properties at the time of the loan.

We pause to observe here that whilst giving his reasons for rejecting the appellant's propositions, the learned Judge seemed to offer no reason why he preferred the valuer's formula.

Before us, Encik Alex Khoo, Counsel for the appellant, attacked the formula adopted by the Government valuer which the trial Judge had accepted to be too simplistic, although he did not say or qualify why it was so. Counsel, however, contended that the appellant should have been paid the whole amount of compensation as the appellant was the chargee of the whole of the said property and the amount awarded was less than the debt owing by the 4th respondent to the appellant under the charge. The authority most strongly relied upon by Encik Khoo in support of his proposition was the decision of an Indian appellate Court in *Topan Das v. Jesaram* 17 PR 1907, in which it was held that when a portion of the mortgaged property is acquired and the compensation money awarded is less than the amount due under the mortgage, the mortgagee will be entitled to the whole of the compensation awarded. Counsel further submitted that it would be fundamentally wrong, indeed inequitable, to apportion the said amount as this would contravene the principle of indivisibility of the charge and the appellant's interest as chargee of the whole of the said property.

Encik Mohd. Salleh, for the State Government, wholly supported the finding of the learned trial Judge. The State Counsel submitted that both the landowner and the chargee have a right to the compensation. He relied on a passage in V.G. Ranachandran, **Law of Land Acquisition and Compensation,** [1979] pp. 296-297, 6th Edn. for the proposition that an authorised officer, whose power in the instant case is vested under the Ordinance, should apportion the sum awarded amongst the persons interested as far as possible in proportion to the value of their interest, that is to say, he should try to apportion to the best of his judgment. Counsel pointed out that the learned writer quoted the case of *Pratap Chand v. Nathu Ram* 103 PLR 1909 in which it was stated that in the case of a mortgaged land, the landowner must pay off the mortgaged amount in proportion to the land acquired. Counsel further submitted that the trial Judge had rightly rejected the principles in *Topan Das* because the case was irrelevant as it was based on the Indian Land Acquisition Act 1894 which has no local equivalent.

Encik Mohd. Annuar, for the 4th respondent, also supported the decision of the trial Judge. In addition, Counsel submitted that *Topan Das*, which dealt with mortgages as opposed to legal charges, could not apply to the instant case since any reception of the English law (meaning, perhaps, the law of mortgages) would contravene s. 3(1)(b) of the Civil Law Act 1956 which provides that English statutes of general application shall only apply if no express provisions have been made in Sabah. But, Sabah has its own Land Ordinance.

We would observe that the Sabah Land Acquisition Ordinance does not provide any rules to determine the method of apportionment between the various persons interested. Under its interpretation section, "person interested" means every person claiming, or entitled to claim compensation under the Ordinance. It is trite that the broad general principle to follow is that every person interested for which the notice of acquisition has been given under the Ordinance should be compensated for the loss

he suffers as a result of the acquisition. Now, the question before us is: What is the correct principle to follow when apportioning the compensation money between a chargor and chargee? The next question, which is fundamental to this appeal, is whether the learned Judge erred in principle when he apportioned the compensation money between the 4th respondent and the appellant, instead of awarding the whole amount to the latter.

Aggarwala on **Compulsory Acquisition of Land in India** (1992 Edn.) (p. 757), in dealing with the principles of apportionment, says that in apportioning the market value of the land acquired amongst several persons interested, such as mortgagor and mortgagee, landlord and tenant the distribution should as far as possible be such as given to each the value of the quantum of interest which he loses by reason of the acquisition. In our view, the learned author above is merely stating a general principle which he has emphasised in the next passage of his treatise (at p. 759):

> The following observations by the Bombay High Court in *Dossibai Nanabhoy Jeejeebhoy v. P.M. Bharucha* [1958] 60 Bom LR 1208 were cited with approval by the Gujarat High Court in *Saraswati v. Bharathkhand Textile Mfg., Co.*, AIR 1967 Gujarat 36, 40:
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> > In apportioning the compensation, the Court has to give to each claimant the value of the interest which he has lost by compulsory acquisition. So stated, the proposition may appear simple, but in its practical application numerous complicated problems arise in apportioning the compensation awarded. The difficulty experienced is due to the nature of a variety of interests, rights and claims to land which have to be valued in terms of money. The compensation awarded for compulsory acquisition is the value of all the interests which are extinguished and that compensation has to be distributed equitably amongst persons having interest therein and the Court must proceed to apportion the compensation so that the aggregate value of all interests is equal to the amount of compensation awarded.

However, in *P. Valia Raja v. T.S. Veeraraghava Iyer,* AIR [1961] Kerala 222 (FB), the Court holding that the apportionment should be quite proportionate to the value of interest which each party has in the property acquired, observed:

> What these interests are is the question to be decided and the same can be evaluated on the basis of the rights that each had in the property at the time of acquisition.

As we have stated earlier, in the instant case, we are dealing with the apportionment between the chargor and chargee. Following the observation in *P. Valia Raja (ibid),* the primary consideration here is the right and interest of the appellant as chargee of the said property. In our opinion, the learned Judge was wrong in principle when he applied the general principles of apportionment to a special situation involving a chargor and chargee. In the circumstances of the instant case, the Government valuer's formula which is of general application cannot apply to a charged property since a charge is indivisible and the security is attached to the whole property. It follows that until the property is discharged, the interest of the appellant is on the whole property and any proceeds of the sale of the property will attach to the said property. Secondly, based on the above consideration and bearing in mind that the area acquired by the State Government was a portion of the said property and that the total compensation sum for the acquired portion was very much less than the outstanding loan due to the appellant, it would be inequitable to make any apportionment of the compensation sum as between the parties. The conclusions which we have expressed above are supported by the *ratio decidendi* in *Topan Das,* an authority not only directly on the point in issue but sound in principle. There, the appeal was from an order under the Indian Land Acquisition Act, awarding to a mortgagee of the land acquired, a sum out of the compensation awarded proportionate to the area acquired as compared with the area mortgaged. Reid J., in his deliberation, examined the authorities and stated (at p. 82):

> The authorities cited are (1) *Gostobehary Pyne v. Shib Nath Dut* [ILR, xx Calc., 241] a case in which a patni taluk had been sold for arrears of revenue and the mortgagee thereof claimed surplus sale-proceeds. The Court said:
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> > We think that the proper view to take of the matter is to regard the surplus sale-proceed as the shape into which the mortgage security is converted and, as before such conversion the security could not be split up into parts and the mortgagee was entitled to realise his money out of the whole of it, its conversion by sale into money ought not to affect his rights in this respect.
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> The ruling was under s. 73 of the Transfer of Property Act, but the principle laid down appears be applicable to the present case.

(2) Ghose on **Mortgages,** Edn. 3, p. 332-3, in which authority is cited, for the rule that, if the mortgaged property is converted into money under circumstances which prevent the mortgagee from following such property, the security will attach to the purchase money. The author adds that as the security of the mortgagee is indivisible the charge would fasten upon the whole proceeds and not on any particular part.

Following the principles laid down from the above authorities, His Lordship allowed the appeal and held (at p. 84):

> A mortgagee is entitled to take as much security as he can get for his money, and when part of the land mortgaged is taken from him his security is diminished pro tanto. In the present case the security has been diminished to the extent of Rs. 410-6-0, and the mortgagee is, in my opinion, entitled to that amount in liquidation of the mortgage debt, the indivisibility of the mortgage attaching itself to the proceeds of the sale of part of the land mortgaged and the whole and each part of that land being security for the whole amount advanced.

It is interesting to note that the learned trial Judge refused to follow the ratio of *Topan Das* because, according to him, the case was decided on a s. 73(2) of the Indian Transfer of Property Act, which has no similar statutory provision in Sabah. Granting that the Indian Court was dealing with its own Transfer of Property Act, which has no equivalent in Sabah, yet, we entirely agree with Reid J. (at p. 82) that although the ruling was made under s. 73 of the Transfer of Property Act, "the principle laid down appears to be applicable to the present case." At this juncture, we would like to say that the submission of Encik Mohd. Annuar on *Topan Das* in the context of s. 3 of the Civil Law Act 1956 was quite misplaced.

Therefore, for reasons stated above, we allow this appeal with costs. Accordingly, we set aside the order of the apportionment and direct the whole of the compensation money be paid to the appellant toward part-payment of the debt due from the 4th respondent to the appellant under the charge. Deposit of the appeal is refunded to the appellant.

K.L. ENGINEERING SDN. BHD. & ANOR.

v.

ARAB MALAYSIA FINANCE BHD.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK AMAR HAJI MOHD JEMURI BIN SERJAN CJ (BORNEO),
TAN SRI DATUK EDGAR JOSEPH JR. SCJ,
DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH SCJ
[CIVIL APPEAL NO. 04-8-1990]
9 MARCH 1994

COMPANY LAW: Claim based on hire-purchase agreement - Whether signatories to the agreement had authority to sign on behalf of company - Whether agreement binding on company - Doctrine of constructive notice - Form 49 of Companies Act 1965 - Whether a public document - Whether rule in Turquand's case applicable.

The respondent, a licensed finance company, sued the first appellant under a hire-purchase agreement purported to have been signed by the second appellant and one Kow Yuen Wah. The lower Court entered judgment for the respondent and the appellants appeal to the High Court was dismissed.

On further appeal to the Supreme Court by the first appellant, Counsel for the second appellant having withdrawn the latter's appeal, the first appellant contended that the learned Judges in both Courts below failed to consider that the first appellant, being a body corporate, could only act through authorised persons and that the hire-purchase agreement was executed by a person who had no authority to act and who was not a director at the material time.

The first appellant further contended that the learned Judge failed to consider the "concession" made by Counsel for the respondent that there was insufficient evidence against the first appellant and ought, at the conclusion of the trial, to have dismissed the respondent's claim against it.

The question before the Supreme Court was whether Form 49, which is a return of particulars of directors, managers and secretaries and changes of particulars required to be lodged with the Registrar of Companies under s. 141(6) of the Companies Act 1965, was